No. 99-1396

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES L. CHANDLER, *et al.*,

Appellants,

v.

KATHERINE HARRIS, in her official capacity as Secretary of the State of Florida, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Florida

MOTION TO DISMISS OR AFFIRM

MATTHEW M. STRICKLER, ESQUIRE
Counsel of Record
STEPHEN J. KASTENBERG, ESQUIRE
AMY B. CARVER, ESQUIRE
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Phone: (215) 665-8500
Fax: (215) 864-8999

EDWARD STILL, ESQUIRE
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, N.W., Suite 400
Washington, D.C. 20005-0400
Phone: (202) 662-8600
Fax: (202) 783-5130

Counsel for Florida State Conference of NAACP Branches, Black Business Association, Gerald Adams, George Baldwin, Willie Brown, Alben Duffie, Larry D. Jones, Edwin L. Miller, Frank S. Rolle, Elry Sands, Jerome Sterling, and Carolyn L. Williams

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 RP

TERENCE J. ANDERSON, ESQUIRE
D. MARVIN JONES, ESQUIRE
BERNADETTE NORRIS, ESQUIRE
c/o University of Miami
School of Law
P.O. Box 248087
Room 426-27 Old Law
Coral Gables, FL 33124-8087
Phone: (305) 284-2253
Fax: (305) 284-6619

Counsel for Congressman Alcee L. Hastings, Lois Frankel, Howard Coleman, Rosa Cruz, Janet Taylor, Tom Gustafson, Ken Jenne, Harold Blitzman, and Robert Coker

PAUL M. SMITH, ESQUIRE
HEATHER GERKEN, ESQUIRE
JENNER & BLOCK
601 13th St., N.W., Suite 1200
Washington, D.C. 20005
Phone: (202) 639-6000

Counsel for Congressman Peter Deutsch

THOMAS TEW, ESQUIRE
JOSEPH A. DEMARIA, ESQUIRE
Miami Center, Suite 2600
201 S. Biscayne Boulevard
Miami, FL 33131
Phone: (305) 536-1112
Fax: (305) 536-1116

Counsel for Congresswoman Ileana Ros-Lehtinen

J. GERALD HEBERT, ESQUIRE
P.O. Box 22827
Alexandria, VA 22304
Phone: (703) 567-5873
Fax: (703) 567-5876

THOMASINA WILLIAMS, ESQUIRE
80 S.W. 8th Street,
Suite 1830
Miami, FL 33130
Phone: (305) 379-6676
Fax: (305) 379-4541

Counsel for Congresswoman Carrie P. Meek, M. Athalie Range, Betty T. Ferguson, Marleine Bastieu, Dr. Bradford E. Brown, Bennie Moore, Ernest ("Pinky") Sands, and Miriam Urra

QUESTIONS PRESENTED

1. Whether this appeal must be dismissed because the Notice of Appeal failed properly to "specify the parties taking the appeal," as required by this Court's Rule 18.1.

2. Whether a settlement may adversely dispose of the rights of defendants who object to the settlement.

3. Whether the doctrine of laches can properly be applied to a challenge to the configuration of United States Congressional Districts.

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MOTION TO DISMISS OR AFFIRM

Certain Intervenor Appellees,[1] through their undersigned counsel, move to dismiss on the ground that plaintiffs' counsel failed to file a sufficient notice of appeal and, in the alternative, to affirm on the ground that the questions presented in the Jurisdictional Statement are so insubstantial as to not need further argument.

STATEMENT OF THE CASE

This action currently challenges the constitutionality of two Congressional districts in south Florida, the 18th and the 23rd, under the principles of *Shaw v. Reno*, 509 U.S. 630 (1993). Those two Congressional districts were originally promulgated in 1992 by a panel of three federal judges as a remedy for its finding that Florida's Congressional Districts were unconstitutional. *DeGrandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992). Those Districts were ratified in 1996 when the Florida Legislature reenacted them without change. Congressional elections

[1] The Intervenor Appellees are: Florida State Conference of NAACP Branches, Black Business Association, Gerald Adams, George Baldwin, Willie Brown, Alben Duffie, Larry D. Jones, Edwin L. Miller, Frank S. Rolle, Elry Sands, Jerome Sterling, Carolyn L. Williams, Congresswoman Carrie P. Meek, M. Athalie Range, Betty T. Ferguson, Marleine Bastieu, Dr. Bradford E. Brown, Bennie Moore, Ernest ("Pinky") Sands, Miriam Urra, Congressman Alcee L. Hastings, Lois Frankel, Howard Coleman, Rosa Cruz, Janet Taylor, Tom Gustafson, Ken Jenne, Harold Blitzman, Robert Coker, Congresswoman Ileana Ros-Lehtinen, and Congressman Peter Deutsch.

were held using those Districts in 1992, 1994, and 1996 without legal challenge.

The present action is the brainchild of the lead plaintiff in the District Court, Thomas Fouts. The original Complaint, as filed on April 2, 1998, challenged three Congressional Districts and two State Senatorial Districts. Plaintiffs' counsel later withdrew the challenges to one Congressional District[2] and the two State Senatorial Districts[3] in the District Court. (J.S. App. 2, 9). The original Complaint named as defendants only state officials acting in their official capacity, in particular, the Secretary of State, the President of the State Senate, the Speaker of the State House of Representatives, and the Governor. In a series of orders, the District Court granted thirty-four individuals and organizations leave to intervene as defendants to defend the legality of the existing Districts.[4] After the Complaint was filed, the 1998 elections

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[2] The Jurisdictional Statement refers to the 17th, 18th and 23rd Congressional Districts without differentiating among them. In the District Court, the plaintiffs voluntarily dismissed their challenge to the 17th Congressional District (J.S. App. 2, 9) after defendants objected that none of them reside in that District as required under *United States v. Hays*, 510 U.S. 737 (1995).

[3] The Jurisdictional Statement suggests (page 13) that the withdrawal of the challenges to the two State Senatorial Districts was contingent on the approval of the settlement. The Opinion and Order of the District Court (J.S. App. 2, 9) make it clear that that withdrawal was unconditional.

[4] The intervenors include (i) the three Congressional Representatives and two State Senators whose districts were being challenged, (ii) registered voters, and (iii) the Florida State Conference of NAACP Branches and the Black Business

were held without any effort by the plaintiffs to obtain preliminary injunctive relief.

Because Mr. Fouts lacked standing to challenge all of the districts to which he objected, he recruited F. Evelyn McLean, James D. Moore, Carvel L. Gonzales, and Harvey E. Oyer, Jr. to join him as plaintiffs by knocking on doors and placing telephone calls to complete strangers. However, Gonzales, the sole plaintiff residing in the 17th Congressional District, and Moore, the sole plaintiff residing in the 23rd Congressional District, moved out of state in the spring of 1999. Accordingly, in the summer of 1999, Mr. Fouts sought to cure the defects in his Complaint by recruiting as plaintiffs James L. Chandler, a resident of the 18th Congressional District, and Charles Bertheas,[5] a resident of the 23rd Congressional District.[6]

Association. The District Court also permitted a Congressman from an adjoining District to intervene solely on issues of relief and the Department of Justice to appear as amicus curiae.

[5] Mr. Bertheas, the newly added, and sole, plaintiff residing in the 23rd Congressional District, first met Mr. Fouts on July 9, 1999. Mr. Bertheas was walking down the street when Mr. Fouts, who was in his car, stopped and asked to talk with him. On the spot, Bertheas signed a declaration authorizing Fouts to list him as a named plaintiff in this litigation. Mr. Bertheas could not identify his Congressional representative and had not voted since 1987. (Bertheas Dep. at 17, attached as Exh. A to Memorandum in Support of Motion of NAACP for Reconsideration of Joinder of New Plaintiffs, hereinafter "Berth. Dep.")

[6] Mr. Fouts did not submit a substitute for Mr. Gonzales, the only plaintiff resident in the 17th Congressional District.

Also in the summer of 1999, the plaintiffs and the state officials originally named as defendants agreed to a purported settlement[7] and moved the District Court for its approval. In that settlement the plaintiffs agreed to abandon their challenge to the two State Senate Districts and the state officials agreed to reconfigure eight Congressional Districts, the three challenged in the Complaint and five adjoining Districts. The defendants who had intervened were not invited to participate in, and were not aware of, the settlement discussions, but filed formal objections to the purported settlement after it became public. By the time the District Court scheduled a hearing, the Governor and the Speaker of the House had disavowed their support for the settlement.[8] At the hearing on the settlement before the District Court, the Florida Attorney General urged the Court to disapprove the settlement.

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[7] Curiously, Charles Bertheas, the sole plaintiff residing in the 23rd Congressional District, a District that would be changed by the settlement, was not aware of the settlement agreement prior to his deposition on October 1, 1999. (Berth. Dep. at 16.) The failure of plaintiffs' counsel to consult with Mr. Bertheas concerning the settlement calls into question whether he is a bona fide party to this litigation.

[8] The opinion of the District Court states that the Secretary of State had also disavowed the settlement. (J.S. App. 3). The Jurisdictional Statement (page 13, note 10) correctly states that the Secretary of State has never disavowed the settlement. This error by the District Court is immaterial in light of the continuing objection to the settlement by the intervening defendants, the Governor, the Speaker, and the Florida Attorney General.

On October 25, 1999, the District Court disapproved the Settlement and dismissed the Complaint on the grounds of laches. On December 17, 1999, the District Court denied a "Motion to Alter and Amend Judgment and/or for Reconsideration of Final Order of Dismissal on Grounds of Laches." On January 13, 2000, the plaintiffs' counsel filed a notice of appeal with the District Court and, on February 18, 2000, counsel filed a Jurisdictional Statement with this Court.

ARGUMENT

I. Because the Notice of Appeal Fails to Specify the Parties Taking the Appeal as Required by Rule 18.1, This Appeal Must Be Dismissed.

Rule 18.1 of this Court's Rules requires a notice of appeal to "specify the parties taking the appeal." In this respect, Rule 18.1 is almost identical to the former Rule 3(c) of the Federal Rules of Appellate Procedure.[9] This Court interpreted the former Rule 3(c) in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) holding that, under that Rule, the use of "*et al.*" was insufficient to "specify the parties taking the appeal":

> The purpose of the specificity requirement . . . is to provide notice both to the opposition and to

[9] Rule 3(c) formerly provided that a notice of appeal "shall specify the party or parties taking the appeal." Fed. R. App. P. 3(c) (amended 1993). That rule has since been amended to permit the use of "et al." This Court's Rule 18, however, remains unchanged and contains no language permitting the use of "et al."

> the court of the identity of the appellant or appellants. The use of the phrase "et al.," which literally means "and others," utterly fails to provide such notice to either intended recipient.

Torres, 487 U.S. at 318.

The Notice of Appeal filed in this case utterly fails to meet the requirements of *Torres*. The caption of the Notice identifies "James L. Chandler, et. al." as "Plaintiffs"; the text of the Notice begins with "COME NOW the Appellants, JAMES L. MOORE, et al., Plaintiffs in the above named case . . . " (J.S. App. 27). From this notice, the reader learns only that (1) the "Appellants" are a subset of the "Plaintiffs", (2) that subset includes a plaintiff James L. Moore,[10] and (3) that subset does not include James L. Chandler, the "plaintiff" listed first in the caption.

A reader who is familiar with the history of this litigation would be totally confused. James D. Moore withdrew as a plaintiff because he moved out of state.[11] In fact, the District Court, on September 9, 1999, entered an Order to the following effect:

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[10] In fact, there has never been a James *L*. Moore who was a plaintiff in this case. As reflected on page ii of the Jurisdictional Statement, there was, at one time, a plaintiff named James *D*. Moore.

[11] The "Supplemental Memorandum of Facts and Law and Motion to Drop Dispensable Party and Substitute Parties Plaintiff" filed by the plaintiffs' counsel in the District Court on August 24, 1999, at page 6, states:

> The original Plaintiff, JAMES D. MOORE (See Complaint at Page 3, Paragraph 5) also moved out of state.

> Accordingly, James L. Chandler, Cecile Demers, and Charles Bertheas are added as plaintiffs in substitution for former plaintiffs Carvel Gonzales and James Moore.

Clearly, James Moore cannot appeal. And the Notice does not reveal which, if any, of the remainder of the "plaintiffs" have authorized counsel to file an appeal on their behalf.[12] Because the Notice of Appeal fails to comply with this Court's Rule 18.1 by specifying the parties that have appealed, this Court must dismiss this appeal.

II. A Settlement May Not Dispose of the Rights of Defendants Without Their Consent.

The Jurisdictional Statement seeks to have this Court accept a "settlement" that was disapproved by the District Court because of the objections of intervenor defendants and state officials. In disapproving the settlement because of the objections made by the defendants, the District Court was following the well-established legal principle that "parties who choose to resolve litigation through settlement may not dispose of the claims of a

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[12] Referring to the "Appellants/Plaintiffs" listed at page ii of the Jurisdictional Statement, former plaintiff Carvel Gonzales also cannot appeal because he moved out of state and withdrew from the action. Plaintiffs Thomas S. Fouts, Harvey E. Oyer, Jr. and Cecile N. Demers cannot appeal because they challenged only State Senatorial Districts in Count II, which Count was voluntarily and unconditionally withdrawn in the District Court. (J.S. App. 2, 9). The only plaintiffs with standing to appeal were James L. Chandler and F. Evelyn McLean, both of whom live in the 18th Congressional District, and Charles Bertheas, who lives in the 23rd Congressional District.

third party . . . without that party's agreement." *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986).

The Jurisdictional Statement attempts to avoid this principle by arguing that, because the intervenor defendants did not assert an affirmative demand for relief, the settlement did not dispose of any of their claims. This argument makes no sense. Defendants who have been granted intervention to defend the status quo have legal rights as great as those of plaintiffs who wish to change the status quo. In this case, the intervenor defendants claim that the existing Congressional Districts, as promulgated by the three-judge federal court and ratified by the Florida Legislature, are legal and constitutional. Before those Districts are changed, the intervenor defendants have the right to require the plaintiffs to satisfy at trial the difficult burden of proof required by the precedents of this Court. *Hunt v. Cromartie*, ___ U.S. ___, 119 S. Ct. 1545 (1999). The District Court correctly determined that the consent of the intervenors and the support of all of the original defendants was required for any settlement.

Lawyer v. Department of Justice, 521 U.S. 567 (1997) does not permit a different result. Indeed, *Lawyer* reaffirmed the general rule that "a settlement agreement subject to court approval in a nonclass action may not impose duties or obligations on an unconsenting party or 'dispose' of his claims." *Id., citing Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986). *Lawyer* recognized a narrow exception to this general rule, applicable only when the party objecting to the settlement achieves the essential goals of his suit through the settlement agreement:

> [The District Court] disposed of appellant's claim not in the forbidden sense of cutting him off from a remedy to which he was entitled, but only in the legitimate sense of granting him an element of the very relief he had sought. As a remedy for what appellant claimed to be an unconstitutional plan he had requested the elimination of that plan, and the settlement decree gave him that relief.

Id. at 579. The Court noted that permitting such a dissenter to block the settlement would allow a "sore winner," looking only for the additional satisfaction of a judgment, to obscure the point of the suit. *Id.*

Regardless, plaintiffs do not dispute that the settlement must fail upon objections by any of the Governor, state Attorney General, or Speaker of the State House, each of whom did object.[13] Indeed, this Court has held the Florida Attorney General may, as the representative of the State, veto a proposed redistricting settlement and force an adjudication on the merits. *Lawyer*, at 2193 & nts. 4 & 5, 2194; *id.* at 2197 & n.2, 2198 (Scalia, J. dissenting) (*citing Growe v. Emison*, 507 U.S. 25, 34 (1993); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (op. of White, J.)).

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[13] The Jurisdictional Statement (pages 12 and 13) suggests that the Governor's objection to the settlement was solely on legal grounds. Governor Bush advised the District Court that he joined the settlement "based upon the assurance that all parties including the intervenor-parties had agreed to the settlement" and that, when he learned that this assurance was untrue, he "announced he would not continue to support the settlement. . . . " (Notice of Defendant Jeb Bush at 2.)

The District Court correctly refused to consider the merits of the settlement in light of the objections of the intervening defendants and the opposition of some state officials, including the Florida Attorney General. This Court can affirm without further briefing.

III. The District Court Properly Applied the Doctrine of Laches.

The District Court held that the plaintiffs' claims were barred by laches because of the plaintiffs' inexcusable delay of five years in bringing this action and because of the prejudice to the defendants and to the electorate of south Florida that would be caused by two Congressional redistrictings within a two year period, one for the 2000 election and another one for the 2002 election. The District Court's holding is completely consistent with the precedents of this Court.

This Court has long recognized that laches bars equitable claims where the plaintiff has failed to act in a timely fashion:

> A court of equity . . . has always refused its aid to stale demands where a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court.

Sullivan v. Portland Kennebec Railroad Co., 94 U.S. 806 (1876), *quoting Smith v. Clay*, Ambler, 645. This Court has

also recognized that frequent redistrictings are disruptive:

> Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the legislative process. . . .

Reynolds v. Sims, 377 U.S. 533, 583 (1964). In a case akin to the instant case, the Fourth Circuit affirmed the dismissal by the District Court of an action seeking imposition of a state assembly redistricting remedy on the grounds that the suit had been brought too close to the decennial redistricting. *Maryland Citizens for a Representative General Assembly v. Governor of Md.*, 429 F.2d 606 (4th Cir. 1970). In so holding, the Fourth Circuit concluded that the imposition of a redistricting remedy "close upon" the final predecennial assembly election would be a "harsh decree" that would "necessarily impose great disruption upon potential candidates, the electorate and the elective process." *Id.* at 610.[14]

Accordingly, there is ample authority for the District Court's holding.

Rather than challenge directly the basis for the decision by the District Court, the Jurisdictional Statement offers this Court a red herring, the possibility of a claim under Section 5 of the Voting Rights Act as recently interpreted by this Court in *Reno v. Bossier Parish School Board*, ___ U.S. ___, 120 S. Ct. 866 (Jan. 24, 2000). The

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[14] Other lower courts have also applied the doctrine of laches to voting rights cases. *See White v. Daniel*, 909 F.2d 99 (4th Cir. 1990); *Lopez v. Hale County*, 797 F. Supp. 547 (N.D. Tex. 1992); *MacGovern v. Connolly*, 637 F. Supp. 111 (D. Mass. 1986).

Jurisdictional Statement argues that the defense of laches cannot apply because the current Congressional Districts will have a continuing effect beyond the 2000 election as the baseline for the Department of Justice's retrogression analysis in the preclearance of the redistricting following the 2000 census. The argument is wrong for four reasons:

1. *Reno v. Bossier* holds that an action brought under Section 5 of the Voting Rights Act is not rendered moot by the holding of the last election under a districting plan subject to review under that Section. It does not address the question of laches. Whether or not *Reno v. Bossier* has any application to this case, the plaintiffs still waited five years before bringing their action, a delay for which they offer no excuse.

2. The plaintiffs remaining in this case have no standing to assert a claim under Section 5. Mr. Chandler and Ms. McLean reside in the 18th Congressional District, which is entirely within Dade County. Mr. Bertheas resides in Broward County.[15] Neither Dade nor Broward County is subject to Section 5 of the Voting Rights Act. As a result, none of the plaintiffs are included in the class that Section 5 was intended to protect. Accordingly, they lack standing to assert a claim under that Section. *See United States v. Hays*, 510 U.S. 737 (1995), *quoting Allen v. Wright*, 468 U.S. 737, 755 (1984); *Allen v. State Board of Elections*, 393 U.S. 544, 557 (1969). To state the same point

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[15] Less than one percent of the population of the current 23rd Congressional District resides in Hendry County, which is subject to Section 5 of the Voting Rights Act. As a result, the current 23rd Congressional District was subject to the Act.

differently, whether or not the new Congressional Districts in which Chandler, McLean, or Bertheas reside will be subject to Section 5 of the Voting Rights Act will depend upon whether the Florida Legislature, after considering the 2000 census, decides to include one of their residences in a Congressional District that also includes some portion of a County subject to Section 5. These plaintiffs lack standing to make such a claim because, at present, it is entirely hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

3. The plaintiffs in this case assert a constitutional claim. Section 5 of the Voting Rights Act is irrelevant to such a claim. Indeed, *Bossier* itself reaffirms that a Section 5 preclearance does not establish the legality of any voting districts but is "nothing more than a determination that the voting change is no more dilutive than what it replaces." *Id.* at 875-76. Thus, action by the Department of Justice under Section 5 could not prejudice plaintiffs' constitutional claims.

4. Finally, the proposed Districts at issue in *Bossier* were not legally established until they were precleared by the District Court, and it was that preclearance that was under appeal to this Court in that case. In contrast, the Districts at issue in this case were established by the Order of a District Court, ratified by the Florida Legislature, and cleared by the Department of Justice to the extent required. For that reason, the Districts challenged here are presumed valid until proven otherwise. *See Hunt v. Cromartie*, ___ U.S. ___, 119 S. Ct. 1545 (1999).

Thus, *Reno v. Bossier* has nothing to do with this case. Because the decision of the District Court to dismiss this case based on laches was well founded in the precedents of this Court, this Court may summarily affirm that decision.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed. In the alternative, this Court should affirm summarily the judgment below.

Respectfully submitted,

TERENCE J. ANDERSON, ESQUIRE
D. MARVIN JONES, ESQUIRE
BERNADETTE NORRIS, ESQUIRE
c/o University of Miami
School of Law
P.O. Box 248087
Room 426-27 Old Law
Coral Gables, FL
33124-8087
Phone: (305) 284-2253
Fax: (305) 284-6619

Counsel for Congressman Alcee L. Hastings, Lois Frankel, Howard Coleman, Rosa Cruz, Janet Taylor, Tom Gustafson, Ken Jenne, Harold Blitzman, and Robert Coker

THOMAS TEW, ESQUIRE
JOSEPH A. DEMARIA, ESQUIRE
Miami Center, Suite 2600
201 S. Biscayne Boulevard
Miami, FL 33131
Phone: (305) 536-1112
Fax: (305) 536-1116

Counsel for Congresswoman Ileana Ros-Lehtinen

MATTHEW M. STRICKLER, ESQUIRE
Counsel of Record
STEPHEN J. KASTENBERG, ESQUIRE
AMY B. CARVER, ESQUIRE
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street,
51st Floor
Philadelphia, PA 19103-7599
Phone: (215) 665-8500
Fax: (215) 864-8999

EDWARD STILL, ESQUIRE
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue,
N.W., Suite 400
Washington, D.C.
20005-0400
Phone: (202) 662-8600
Fax: (202) 783-5130

Counsel for Florida State Conference of NAACP Branches, Black Business Association, Gerald Adams, George Baldwin, Willie Brown, Alben Duffie, Larry D. Jones, Edwin L. Miller, Frank S. Rolle, Elry Sands, Jerome Sterling, and Carolyn L. Williams

J. GERALD HEBERT, ESQUIRE
P.O. Box 22827
Alexandria, VA 22304
Phone: (703) 567-5873
Fax: (703) 567-5876

THOMASINA WILLIAMS, ESQUIRE
80 S.W. 8th Street,
Suite 1830
Miami, FL 33130
Phone: (305) 379-6676
Fax: (305) 379-4541

Counsel for Congresswoman Carrie P. Meek, M. Athalie Range, Betty T. Ferguson, Marleine Bastieu, Dr. Bradford E. Brown, Bennie Moore, Ernest ("Pinky") Sands, and Miriam Urra

PAUL M. SMITH, ESQUIRE
HEATHER GERKEN, ESQUIRE
JENNER & BLOCK
601 13th St., N.W.,
Suite 1200
Washington, D.C. 20005
Phone: (202) 639-6000

Counsel for Congressman Peter Deutsch